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No. 88-802

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

KATHLEEN STONEKING

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The Respondent, Kathleen Stoneking (hereinafter "Stoneking") has included in her Brief in Opposition to Petition for Writ of Certiorari a number of misstatements of fact and law that distort Petitioners' arguments. Petitioners take this opportunity to redirect this Court's attention to the real issue presented in this case: whether Petitioners Smith, Miller and Shuey are immune from suit under the facts alleged by Stoneking in this case.

II. PETITIONERS ARE ENTITLED TO THE DEFENSE OF QUALIFIED IMMUNITY

In their Petition for Writ of Certiorari, Petitioners have argued that they are entitled to assert the defense of qualified immunity, because no clearly established law existed in 1979 upon which liability can be based. Judge Stapleton, in his dissent to the Third Circuit panel decision, correctly noted that no such clearly established law existed in 1979, saying

> neither this Court [the Third Circuit] nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.

App., p. 26.

Stoneking, however, distorts this argument, and claims that "Petitioners argue that, unlike police officers

who have a duty to supervise and control their subordinates for the benefit of the public, school officials have no duty to supervise and control teachers for the benefit of students." Respondent's Brief, p. 4, n. 3. This is a gross misstatement of Petitioners' position. Petitioners recognize that, as school administrators, they have a contractual and statutory duty to supervise their subordinates. However, even if this duty is now held to rise to constitutional dimensions, this is not the duty which Stoneking would place upon Petitioners, nor was any such duty established in 1979. As Judge Stapleton further noted in his dissent,

> It is one thing to hold that a public school administrator has a duty to protect a particular student within his or her jurisdiction whom he or she knows to be in particular jeopardy. It is another thing to hold that there is an affirmative duty to protect an individual in a position like that of Stoneking, whom the administrator had no reason to believe was any more at risk from sexually aggressive teachers than her female classmates. The Court [Third Circuit] points to nothing that should have made the leap between these two propositions apparent to the school administrators. Indeed, the authorities relied upon by the Court suggest that there is no duty to protect in the absence of notice that a particular individual is in peril.

App., p. 28-29.

The disparity between these two propositions noted by Judge Stapleton lies at the very heart of Petitioners' contention that they are entitled to the defense of qualified immunity. Petitioners cannot be held accountable for not anticipating in 1979 that such a leap would be made by the Third Circuit in 1988; accordingly, they are entitled to the defense of qualified immunity.

Further, both the Court below and Stoneking continue to fail to appreciate that the Pennsylvania Commonwealth Court's ruling in *Scott vs Willis*, ____ Pa.Cmwlth. _____, 543 A.2d 165 (1988), is of special significance to this case. In *Scott*, the appellate court ruled, as a matter of law, that a school district and its administrators would not be liable for the sexual abuse of students, "[i]n the absence of an affirmative promise to protect a particular individual who eventually suffers the foreseeable injury . . ." *Id.* at 171. Petitioners agree with Stoneking's statement that *Scott* does not stand for the proposition that school officials can tolerate the abuse of students by teachers; Petitioners have never claimed otherwise. However, the ruling in *Scott* contradicts Stoneking's claim that a school district or its administrators are liable for injuries to a student in the absence of actual knowledge of criminal activity occurring or knowledge that any particular student is at risk.

This holding in *Scott vs Willis* is at odds with the Third Circuit decision, and Stoneking's claim, in the present

case. This disparity demonstrates that the law regarding the right and corresponding duty owed by Petitioners, now claimed by Stoneking, was not clearly established in 1979, and indeed has not been clearly established to the present time. Certainly, if both state and federal appellate courts cannot agree on whether any constitutional duty exists, the lay public school administrators could not be expected to make any such determination. Petitioners are entitled to assert the defense of qualified immunity, and be dismissed as defendants in this case.

III. RESPONDENT ERRS IN RELYING ON *INGRAHAM VS WRIGHT* FOR THE PROPOSITION THAT PETITIONERS VIOLATED A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT.

Stoneking, on page 5 of her brief, argues that this Court's decision in *Ingraham vs Wright*, 430 U.S. 651 (1977), establishes that she possesses a liberty interest in her personal bodily integrity, allowing her to be free from sexual abuse. Further, as a necessary corollary, she asserts that there is, in fact, a clearly established affirmative duty of school administrators to protect unidentified school students from sexual abuse by a staff member. However, *Ingraham* does not stand for this corollary proposition.

Instead, this Court held in *Ingraham* that procedural due process does not require that a hearing be held prior to the of corporal punishment of a student, because the

existence of common law remedies for any unwarranted or excessive punishment satisfies 14th amendment due process concerns. *Id.*, p. 684. Thus, while this Court decided the question of whether or not a student's *procedural* due process rights may be violated in certain corporal punishment situations, this Court did not address the issue of whether a student's right to be free from invasions of bodily integrity was a right protected by the *substantive* component of the due process clause.

In the instant case, however, Stoneking is claiming that her *substantive* constitutional rights were violated. But the application of this Court's decision in *Ingraham* to the present case reveals that Petitioners have not done anything to deprive Stoneking of her claimed liberty interest without due process of law. In fact, nothing that any of the Petitioners has done or failed to do has deprived her of seeking a traditional remedy in state court under common law tort principles. Stoneking remains free to pursue in state court her alleged assailant, Edward Wright, for his intentional tort of battery, if it be such. Because she has access to this remedy, no due process violation can be alleged;[1] this is all that *Ingraham* requires.

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[1]Section 1983 was not designed to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states . . ." *Daniels vs Williams*, 474 U.S. 327 (1986), quoting *Paul vs Davis*, 424 U.S. 693, 701 (1976). While Petitioners are immune from suit under state law for state tort claims, this Court has already determined that the limited shield of sovereign immunity does not deprive a claimant of due process rights. For example, in *Martinez vs California*, 444 U.S. 277 (1980), this Court held that a claim against the State of California,

Moreover, *Ingraham* has no factual correspondence to Stoneking's claim. The rule established in *People of Three Mile Island vs Nuclear Regulatory Commissioners*, 747 F.2d 139, 145 (3rd Cir. 1984), requires some, but not precise, factual correspondence between applicable legal precedence and the case at issue.[2] *Ingraham*, however, discusses only procedural due process rights of students, and has no factual or legal relevance to whether or not the substantive right by Stoneking, and the corresponding duty which Stoneking would now place upon Smith, Miller and Shuey, were clearly established in 1979.

The distinction Smith, Miller and Shuey draw between the corporal punishment cases such as *Ingraham* and this case is not merely semantic. Rather, an examination of *Hall vs Tawney*, 621 F.2d 607 (4th Cir. 1980), relied

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barred by the doctrine of sovereign immunity, did not violate the due process clause of the Fourteenth Amendment. The following term, in *Parratt vs Taylor*, 451 U.S. 527 (1981), this Court held that the State of Nebraska tort claims procedure complied with due process even though it provided less relief than traditional tort remedies.

[2] Likewise, the police misconduct cases cited by Stoneking in her brief are inapplicable to any legal issues presented in this appeal. The police misconduct case cited on Page 7 of Respondent's Brief, as well as the cases cited on Page 4, n. 3, assume the existence of actual state custody or police detention, factors which are admittedly absent from this case. Because these factors go to the very heart of whether or not a special relationship exists, these critical factual differences between the case at bar and the cases cited by Stoneking demonstrate the lack of a "special relationship" sufficient to impose liability on Smith, Miller and Shuey.

upon by both Stoneking (page 6 of her Brief) and the court below, reveals the critical distinction between the case at bar and a case of allegedly improper corporal punishment. In *Hall*, the Fourth Circuit found that recognizing a substantive due process right to be free from "*state intrusions* into realms of personal privacy and bodily security" was appropriate "as a last line of defense against . . . literally outrageous abuses of official power . . ." *Id.* at 613 [emphasis supplied].

In *Hall*, the Court was faced with allegations that a child had been subjected to paddling despite her parents' prior instructions to the school that they did not wish school officials to inflict corporal punishment on their daughter. What was at issue, then, was a *conscious decision* by school officials to inflict corporal punishment on a student. The persons who made that decision were the defendants who were alleged to have abused their "official power" and who actually visited the "intrusion into . . . personal privacy and bodily security . . ."

In the case at bar, however, far from a "literally outrageous abuse of official power," Stoneking accuses Smith, Miller and Shuey of not exercising their power sufficiently to prevent harm from being visited upon her from another source. They are not accused of any sexual contact with Stoneking; thus they are not the actors who

inflicted the actual harm on her.[3] The allegations of her Complaint are thus of an entirely different character than the authority upon which she primarily relies.

The extension of liability for violations of a person's civil rights to persons other than those who actually inflict the harm not only was not clearly established in 1979, it has not even been established to this date. There can be no doubt, therefore, that Smith, Miller and Shuey are immune from this suit.

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[3] There is no allegation that the sexual contact with Edward Wright was sanctioned, approved or ratified by Smith, Miller and Shuey. Since it was that contact which constitutes the "intrusion," in no way has there been a "state intrusion" as that term is used by the Court in *Hall vs Tawney*.

IV. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issued from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.

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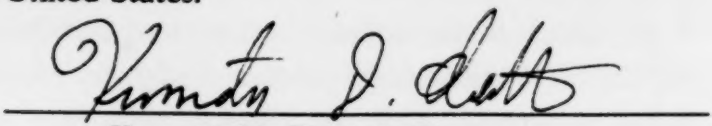
V. CERTIFICATION OF MEMBERSHIP

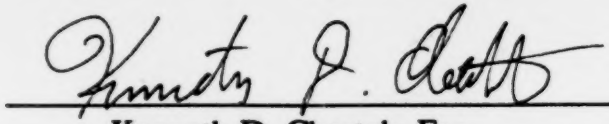
It is hereby certified that both Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



Kenneth D. Chestek, Esq.

VI. PROOF OF SERVICE

I hereby certify that three copies of the within Petitioners' Reply Brief in Support of Petition for Writ of Certiorari were served on Deborah W. Babcox, Esq., 222 West Washington Street, Bradford, PA 16701 and Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 11 day of January, 1989.



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